(b)(6)

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

[redacted]

Date: MAY 2 2 2013 Office: TEXAS SERVICE CENTER FILE: [redacted]

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of $630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you, Elizabeth M'Cormack

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Texas Service Center. The petitioner appealed to the Administrative Appeals Office (AAO). The AAO dismissed the appeal. Counsel to the petitioner filed a motion to reconsider the AAO's decision in accordance with 8 C.F.R. § 103.5. The motion will be granted, and the appeal will be dismissed on its merits. The petition remains denied.

The petitioner is a CPA office. It seeks to employ the beneficiary permanently in the United States as an accountant pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). The petition is accompanied by an ETA Form 9089, Application for Permanent Employment Certification (labor certification), approved by the Department of Labor (DOL).

The director determined that the ETA Form 9089 failed to demonstrate that the job requires a professional holding an advanced degree or the equivalent of an alien of exceptional ability and, therefore, the beneficiary cannot be found qualified for classification as a member of the professions holding an advanced degree or an alien of exceptional ability. 8 C.F.R. § 204.5(k)(4). The director denied the petition accordingly. The AAO affirmed the director's decision and dismissed the appeal.

The issue on motion is whether the petitioner has established that the job requires a professional holding an advanced degree such that the beneficiary may be found qualified for classification as an advanced degree professional.

On motion, counsel asserts a typographical error was made in indicating on the ETA Form 9089 that the petitioner required only 3 months of job experience and that otherwise the beneficiary qualifies as a member of the professions holding an advanced degree or an alien of exceptional ability. Counsel asserts that box d. of the Form I-140 was inadvertently checked and that United States Citizenship and Immigration Services (USCIS) has the authority to switch the category from a category 2 to a category 3 preference without making a change to the Form ETA 9089. Counsel asserts that USCIS can and has in the past re-adjudicated a petition on an as needed basis, after weighing compelling interests such as small business development interests in the United States.

The job offer portion of the ETA Form 9089 indicates that the minimum level of education required for the position is a bachelor's degree in accounting and 3 months experience in the job offered. It is the job requirements of the ETA Form 9089 which drive the proper category for which to seek classification. 8 C.F.R. § 204.5(k)(4). The beneficiary must then meet the requirements of the labor certification by the priority date. *See Matter of Wing's Tea House*, 16 I&N 158 (Act. Reg. Comm. 1977). Accordingly, the job offer portion of the ETA Form 9089 does not require a professional holding an advanced degree or the equivalent of an alien of exceptional ability. However, the petitioner requested classification as a member of the professions holding an advanced degree or an alien of exceptional ability on the Form I-140.

Counsel claims that there is no discrepancy in that the beneficiary holds a bachelor's degree in accounting and has acquired more than a sufficient number of years of experience in the job offered

to qualify for the position. Counsel further asserts that the petitioner is seeking the category of "aliens of exceptional ability," not "a member of the professions holding and advanced degree," and that the beneficiary qualifies as such. Counsel asserts that the beneficiary meets the required categories for an alien of exceptional ability in that the beneficiary 1) has a degree from an institution of learning relating to the area of exceptional ability, 2) has a license to practice the profession or certification for a particular profession or occupation, 3) has evidence of membership in professional association, and 4) has evidence of recognition for his achievements and significant contributions to the industry or field by his peers, governmental entities or professional or business organizations.

The petitioner submitted as evidence on motion a copy of the beneficiary's bachelor's degree and school transcript, a Certification of Tax Accountant dated December 18, 1996, showing that the beneficiary is licensed to practice as a tax accountant according to the Korean Accountant Law, two Certificates for Business Registration dated July 12, 1997 and April 15, 1999 for CPTA tax accountant , a Certificate of Course Work Completion dated June 27, 1997 from the for , and two Certificates of Appointment dated February 1, 1998 and June 9, 1999 from the for a Certificate of Completion.

Contrary to counsel's claims, the above noted evidence is insufficient to show that the beneficiary, as an accountant, had a membership in a professional association or possesses documentation attesting to the beneficiary's recognition for his achievements and significant contributions to the industry or field by his peers, governmental entities or professional or business organizations. Section 203(b)(2)(A) of the Act and 8 U.S.C. § 1153(b)(2), provides for the granting of preference classification to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.

The regulations at 8 CFR § 204.5(k)(2) states in pertinent part:

> *Exceptional ability in the sciences, arts, or business* means a degree or expertise significantly above that ordinarily encountered in the sciences, arts, or business.

Therefore, the petitioner has not established that the beneficiary possesses exceptional ability in the sciences, arts, or business significantly above that ordinarily encountered in the sciences, arts, or business. The evidence merely demonstrates that the beneficiary has obtained a bachelor's degree in accounting, is an accountant, and has received standard accounting business licenses in Korea.

The petitioner's job postings and employment ads state that 3 years of job experience is required, which is insufficient, when combined with the educational requirement to be considered the equivalent of an advanced degree. Contrary to counsel's claim, there is no provision in statute or

regulation that compels United States Citizenship and Immigration Services (USCIS) to re-adjudicate a petition under a different visa classification in response to a petitioner's request to do so. A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1988). It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

Counsel states on motion that the petitioner submitted another Form I-140 that has been approved, and which indicates that it is seeking classification as a professional possessing a bachelor's degree (Form I-140 at Part e.), and that such status can be inferred with respect to the instant petition. Contrary to counsel's claim, the new petition's approval does not change the fact that the current Form I-140 petition (receipt number SRC 08 283 51001) is inconsistent with its accompanying ETA Form 9089 requirements. There can be no status inferred into the instant petition based upon a subsequent filing which has been approved. Contrary to counsel's claims, USCIS is not in a position to alter the petition to bring it into compliance with the labor certification. The burden of proof rests solely on the petitioner. There is no provision in statute or regulation that compels USCIS to re-adjudicate a petition under a different visa classification in response to a petitioner's request to do so. A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1988).

The minimum requirement found in the ETA Form 9089 falls below the minimum permitted for an advanced degree professional. 8 C.F.R. § 204.5(k)(4). To the extent the petitioner is requesting a change to the professional category; a petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi* at 176.

The minimum job experience requirement found in the ETA Form 9089 falls below the minimum permitted for an advanced degree. 8 C.F.R. § 204.5(l). The evidence submitted does not establish that the ETA Form 9089 requires a professional holding an advanced degree or the equivalent of an alien of exceptional ability, and the motion must be dismissed.

Counsel requests that humanitarian benefits be extended to the beneficiary based upon family unity and requests that USCIS take into consideration the physical challenges of the beneficiary's U.S. born children. The AAO does not have discretionary authority to issue a decision on a Form I-140 petition based on humanitarian grounds. The authority to adjudicate appeals is delegated to the AAO by the Secretary of Homeland Security pursuant to the authority vested in him through the Homeland Security Act of 2002, Pub. L. 107-296. The matter before the AAO on appeal includes the Form I-140 petition for an advanced degree professional along with documentation to establish the specific requirements for the visa category. The AAO may not extend additional discretionary authority for humanitarian benefits into the adjudication of the instant appeal. Therefore, it is

insufficient to bestow humanitarian benefits upon the beneficiary beyond that which is provided by the petition.

Beyond the decision of the director, the petitioner has also failed to establish its ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence. *See* 8 C.F.R. § 204.5(g)(2).

In determining the petitioner's ability to pay the proffered wage, USCIS first examines whether the petitioner has paid the beneficiary the full proffered wage each year from the priority date. If the petitioner has not paid the beneficiary the full proffered wage each year, USCIS will next examine whether the petitioner had sufficient net income or net current assets to pay the difference between the wage paid, if any, and the proffered wage.[1] If the petitioner's net income or net current assets is not sufficient to demonstrate the petitioner's ability to pay the proffered wage, USCIS may also consider the overall magnitude of the petitioner's business activities. *See Matter of Sonegawa,* 12 I&N Dec. 612 (Reg'l Comm'r 1967).

The petitioner is a sole proprietorship, a business in which one person operates the business in his or her personal capacity. Black's Law Dictionary 1398 (7th Ed. 1999). Unlike a corporation, a sole proprietorship does not exist as an entity apart from the individual owner. *See Matter of United Investment Group*, 19 I&N Dec. 248, 250 (Comm. 1984). Therefore the sole proprietor's adjusted gross income, assets and personal liabilities are also considered as part of the petitioner's ability to pay. Sole proprietors report income and expenses from their businesses on their individual (Form 1040) federal tax return each year. The business-related income and expenses are reported on Schedule C and are carried forward to the first page of the tax return. Sole proprietors must show that they can cover their existing business expenses as well as pay the proffered wage out of their adjusted gross income or other available funds. In addition, sole proprietors must show that they can sustain themselves and their dependents. *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

In *Ubeda*, 539 F. Supp. at 650, the court concluded that it was highly unlikely that a petitioning entity structured as a sole proprietorship could support himself, his spouse and five dependents on a gross income of slightly more than $20,000 where the beneficiary's proposed salary was $6,000 or approximately thirty percent (30%) of the petitioner's gross income.

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[1] *See River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009); *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986); *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983); and *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873 (E.D. Mich. 2010), aff'd, No. 10-1517 (6th Cir. filed Nov. 10, 2011).

In the instant case, the sole proprietor reported on his IRS Forms 1040 that he claimed three dependents. IRS Forms 1040 from the sole proprietor reflect the adjusted gross income (AGI) as shown in the table below:

- In 2006, the sole proprietor's IRS Form 1040 stated AGI of $126,801.00.
- In 2007, the sole proprietor's IRS Form 1040 stated AGI of $130,252.00.
- In 2008, the sole proprietor's IRS Form 1040 stated AGI of $141,602.00.

The sole proprietor indicated that his average annual household expenses (HHE) were $8,980.00 per month ($107,760.00 per year).

- In 2006, the sole proprietor's HHE were $107,760.00 (a surplus of $19,041.00).
- In 2007, the sole proprietor's HHE were $107,760.00 (a surplus of $22,492.00).
- In 2008, the sole proprietor's HHE were $107,760.00 (a surplus of $33,842.00).

Therefore, in 2006, 2007, and 2008, the sole proprietor's adjusted gross income minus his annual household expenses is insufficient to pay the proffered wage amount in those years. Further, the petitioner failed to establish that factors similar to *Sonegawa* existed in the instant case, which would permit a conclusion that the petitioner had the ability to pay the proffered wage despite its shortfalls in wages paid to the beneficiary, net income and net current assets.

Accordingly, after considering the totality of the circumstances, the petitioner has also failed to establish its continuing ability to pay the proffered wage to the beneficiary since the priority date.

Beyond the decision of the director, under 20 C.F.R. §§ 626.20(c)(8) and 656.3, the petitioner has the burden when asked to show that a valid employment relationship exists, that a *bona fide* job opportunity is available to U.S. workers. *See Matter of Amger Corp.*, 87-INA-545 (BALCA 1987). A relationship invalidating a *bona fide* job offer may arise where the beneficiary is related to the petitioner by "blood" or it may "be financial, by marriage, or through friendship." *See Matter of Sunmart 374*, 00-INA-93 (BALCA May 15, 2000).

The ETA Form 9089 specifically asks in Section C.9: "Is the employer a closely held corporation, partnership, or sole proprietorship in which the alien has an ownership interest, or is there a familial relationship between the owners, stockholders, partners, corporate officers, incorporators, and the alien?" The petitioner checked "no" to the question of whether the beneficiary was related to the owner. In determining whether the job is subject to the alien's influence and control, the adjudicator will look to the totality of the circumstances. *See Modular Container Systems, Inc.*, 1989-INA-228 (BALCA Jul. 16, 1991) (*en banc*). The same standard has been incorporated into the PERM regulations. *See* 69 Fed. Reg. 77326, 77356 (ETA) (Dec. 27, 2004). It appears from the evidence contained in the record of proceeding that the petitioner and the beneficiary are in a familial relationship in that they share the same last name. This could preclude the existence of a valid employment relationship. Accordingly, if the appeal were not being dismissed for reasons set forth

herein, this would call into question the bona fides of the job offer. The petitioner must address this issue in any further proceedings.

For these reasons, considered both in sum and as separate grounds for denial, the petition may not be approved. The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The AAO's prior decision, dated September 7, 2012, is affirmed. The petition remains denied.